

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL RELATIONS BOARD  
REGION 9

In the Matter of

BRASFIELD & GORRIE, LLC

Respondent,

and

UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA (UBC),  
INDIANA/KENTUCKY/OHIO REGIONAL  
COUNCIL OF CARPENTERS

Charging Party.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No. 09-CA-199567

---

**BRIEF OPPOSING THE  
EXCEPTIONS BEFORE THE BOARD  
FILED BY THE CHARGING PARTY**

---

SMITH & SMITH ATTORNEYS

/s/ James U. Smith III

James U. Smith III

Jacob W. Crouse

400 North, First Trust Centre

200 South Fifth Street

Louisville, Kentucky 40202

Attorneys for Respondent

Brasfield & Gorrie, LLC

## **RESPONDENT'S ANSWERING BRIEF**

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Respondent Brasfield & Gorrie, LLC ("Brasfield" or "Respondent") hereby submits this Answering Brief in response to the Charging Party's Exceptions to the Decision and Order of Administrative Law Judge Andrew S. Gollin ("Law Judge") dated December 8, 2017, in the above-captioned case. Brasfield respectfully submits that the Law Judge correctly applied the relevant legal standard to his findings of fact, and that in all respects the findings of fact and conclusions of law of the Law Judge are appropriate, proper, and fully supported by the substantial and credible record evidence.

### **I. Preliminary Statement**

This matter involves an unfair labor practice charge, Case 09-CA-199567, wherein the United Brotherhood of Carpenters and Joiners of America (UBC), Indiana/Kentucky/Ohio Regional Council of Carpenters ("Charging Party") alleges that John Wickham ("Wickham"), Senior Safety Manager for Brasfield, created the impression of surveillance on May 24, 2017, by creating the appearance that he was taking photographs or recording videos of a work stoppage at the Omni Hotel & Residences Project in Louisville, Kentucky (the "Project"). (Joint Exhibit 1; Complaint, ¶ 5). On August 17, 2017, the Regional Director for Region 9 of the National Labor Relations Board (the "Board") issued a Complaint alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the "Act") based upon the alleged surveillance of May 24, 2017.

A hearing on the Complaint was held before the Law Judge on November 8, 2017 in Cincinnati, Ohio. At the conclusion of that hearing, the Complaint was amended to include

allegations that Wickham engaged in unlawful surveillance at the Project during the work stoppage on May 25, 2017. (Hearing Transcript, p. 297).

In the Decision and Order (“Decision”) of the Law Judge dated December 8, 2017, the Law Judge found that Brasfield did not violate Section 8(a)(1) of Act in any manner and that Wickham had legitimate justification for taking two photos and recording a short video of individuals engaged in misconduct during the work stoppage on May 25, 2017. This latter finding was based on the fact that Wickham personally observed and documented misconduct by the individuals engaged in the work stoppage as that misconduct was occurring. (Decision, pp. 10-11).

Charging Party has filed two Exceptions to the Decision. First, Charging Party asserts that the Law Judge “errored [sic] by using the wrong standard in the application of his decision.” (Charging Party’s Exceptions). In its second Exception, Charging Party argues that the Law Judge was not provided with sufficient evidence to conclude that Wickham documented misconduct at the Project as it was occurring. (*Id.*). This attempt to reverse the findings in the comprehensive and thoughtful decision of the Law Judge is based substantially on unfounded assertions and mischaracterizations of the record. Charging Party misconstrues the relevant standard for justifying photographing or videoing misconduct, and offered no evidence at the hearing which contradicted the unequivocal and certain testimony of Wickham.

Contrary to the assertions of Charging Party, it is clear that after thoroughly assessing and weighing the credible evidence, the Law Judge correctly held that Respondent did not violate the Act in any respect.

## **II. Statement of Facts**

As Charging Party has disputed some of the factual findings of the Law Judge, Brasfield provides the following recitation of pertinent facts:

### **a. The Omni Hotel Project**

Brasfield serves as the general contractor for the Project, a \$300,000,000.00 undertaking to erect a 29-story hotel and residences building located at 400 South Second Street in Louisville, Kentucky. (Joint Exhibit 1; Hearing Transcript, pp. 192-195, 214-215, 304). Brasfield contracted with many subcontractors and vendors to supply labor, materials, and services at the Project. Relevant to this case, Brasfield has contracted with Performance Commercial Contractors, LLC (“PCC”) to complete metal framing, hanging, and drywall installation for the interior of the Project. (Joint Exhibit 1; Hearing Transcript, p. 207). PCC, in turn, contracted with Professional Drywall Concepts, Inc. (“PDC”) to supply labor to complete those services. Brasfield does not have a contractual relationship with PDC. (Respondent Exhibit 1). At its most active, PDC employed in excess of 125 workers at the Project. (Hearing Transcript, p. 206).

The Project is contained within a one-block area in Downtown Louisville, the boundaries of which are Second Street (east boundary), Third Street (west boundary), Muhammad Ali Boulevard (south boundary), and Liberty Street (north boundary). (Respondent Exhibit 2). For reasons of access and safety, the Project is surrounded by a combination of fencing, barricades, and gates. (Hearing Transcript, pp. 209-210). Access to the Project is strictly controlled. (*Id.* at 217-218). Brasfield is responsible for safety and security within the confines of the Project. (*Id.* at 208-209).

During the period in question and throughout the Project, the majority of the workers parked offsite and walked to the Project. (*Id.* at 234). The main worker entrance is located on Third Street. (Respondent Exhibit 3; Hearing Transcript, pp. 230-232). Workers reach this entrance by the Third Street crosswalk at the northeast corner of the Project. (Hearing Transcript, pp. 230-232). The workers then enter a protected walkway on the east side of Third Street to enter through the pedestrian gate. This walkway has been restricted to Project personnel and is shielded by barricades. (*Id.*). (“Third Street Employee Entrance”). A separate vehicle and delivery entrance is located on the east side of Third Street. (*Id.*). (“Third Street Vehicle Delivery Entrance”). Third Street is a one-way street with traffic traveling north to south, meaning that vehicles seeking to enter the Third Street Vehicle Delivery Entrance may do so only by traveling south on Third Street. (*Id.* at 67-68).

The local offices for both PCC and PDC are located on the west side of Third Street, opposite the Project, in the Starks Building parking garage. (*Id.* at 232-236).

**b. John Wickham**

Wickham is Senior Safety Manager and Contractor Controlled Insurance Plan Manager for Brasfield at the Project. (Hearing Transcript, p. 175). Wickham’s job duties include overseeing the safety of the Project, managing subcontractors’ safety programs, and ensuring overall compliance with safety programs at the Project. (*Id.* at 176; Respondent Exhibit 4). Wickham frequently conducts walkthroughs of the Project for the purpose of documenting safety issues. (*Id.* at 223-226). Other managers and safety personnel often accompany him on these walkthroughs. (*Id.*). When either beneficial for the education of Project workers or required to address safety issues, Wickham will photograph potential hazards, defects, or conditions to

provide to the subcontractor responsible for that area of the Project to remedy, or to utilize in safety training at a later date. (*Id.*). It is Wickham's practice to delete such photographs after he has addressed the safety issue. (*Id.*).

Part of Wickham's routine is to greet workers at the Project each morning as they enter the Third Street Employee Entrance. (*Id.* at 229-230). Wickham typically takes his position at that entrance thirty minutes before workers start their day, and remains at the entrance until most workers have entered the jobsite. (*Id.*). Wickham follows this routine to build rapport with the workers, and to ensure that the workers entering the Project are fit to work – that is, they are wearing personal protective equipment, they do not appear to be under the influence of drugs or alcohol, and they are not manifesting any other characteristic that indicates a condition not suitable to the working environment. (*Id.*).

**c. Work Stoppages on May 24 and 25, 2017**

On May 24, 2017, Wickham arrived at the jobsite at 6:00 a.m. (Hearing Transcript, pp. 237-239). Shortly thereafter, he took his normal position at the Third Street Employee Entrance. (*Id.*). At approximately 7:00 a.m., Wickham noticed of a group of workers gathering outside the offices of PCC and PDC on the west side of Third Street. (*Id.* at 238-240). Wickham observed some 60 to 70 workers gathered at that location. (*Id.*). None of those workers reported to the jobsite on May 24. (*Id.*). After leaving his post at the Third Street Employee Entrance that morning, Wickham continued with his normal duties, supervising a new employee orientation and then conducting his typical walkthroughs of the jobsite. (*Id.* at 237). Other than the mass refusal to report for work by PDC employees, Wickham did not recall any

other unusual events the balance of that day. (*Id.* at 241). Wickham did not take any photographs or record any video of the work stoppage on May 24. (*Id.* at 270).

On May 25, 2017, an even larger group of picketers, approximately 135 in number, gathered outside the offices of PCC and PDC around 7:00 a.m. (*Id.* at 244-245). Wickham again was stationed at the Third Street Employee Entrance. (*Id.*). From his vantage point, Wickham saw that six to ten of the assembled picketers were blocking the alleyway next to the Starks Building Garage, which was open to traffic. (*Id.* at 245-246). Concerned for the safety of the workers, Wickham requested that the assembled picketers clear the alleyway, which they did. (*Id.*). Shortly thereafter, picket signs were distributed to the picketers, and they began to spread out from their position in front of the PCC and PDC offices. (*Id.* at 246-248). A group of picketers then entered the Third Street crosswalk and the protected walkway on the east side of Third Street. (*Id.* at 248-249). Some of the picketers proceeded to block the Third Street Employee Entrance and the Third Street Vehicle Delivery Entrance. (*Id.* at 248-250).

Wickham testified that he witnessed Project workers being prevented from entering the Third Street Employee Entrance as a result of picketers blocking the crosswalk, protected walkway, and gate. (*Id.* at 249-257, 289-291). Wickham testified further that at least one delivery vehicle was unable to utilize the Third Street Vehicle Delivery Entrance due to the presence of picketers in front of that gate; the delivery vehicle drove away without ever gaining entrance. (*Id.*).

Upon witnessing that workers and delivery vehicles were unable to access the Project because picketers were blocking the entrances, Wickham asked the picketers to cease blocking the Third Street Employee Entrance and the Third Street Vehicle Delivery Entrance.

(*Id.* at 257-259). Some of the picketers then moved away from those entrances. (*Id.*). A group of approximately 30 to 35 picketers continued to block the crosswalk and protected walkway at Third Street, however, preventing other Project workers from entering the jobsite and/or forcing workers to cross in the middle of the street to access the pedestrian entrance. (*Id.*)

Because Wickham was concerned for both the safety of the picketers and the safety of the workers trying to enter the jobsite as a result of the unabated misconduct of the picketers, he took two photographs of the picketers blocking the crosswalk and protected walkway. (*Id.* at 258-259). Wickham testified that it took ten to fifteen seconds to take these photographs. (*Id.* at 260). Wickham also testified that the picketers continued to block the crosswalk and protected walkway for the balance of the day. (*Id.* at 254).

Later that morning, Wickham was conducting a safety walkthrough on the fourteenth floor of the Project when he observed three black SUVs traveling south on Third Street. (*Id.* at 260-262). Each of these vehicles stopped in a separate lane on Third Street, blocking all three open lanes of traffic and thereby blocking vehicular access to the Third Street Vehicle Delivery Entrance. (*Id.* at 212, 260-262). Using his cellular telephone, Wickham took a short video of this activity. (*Id.* at 262). After taking the video, Wickham called the Louisville Metro Police Department to report the interference with traffic on Third Street caused by the stopped SUVs. (*Id.* at 261-263). Shortly thereafter, Wickham observed two police vehicles turn onto Third Street. (*Id.*). When the police vehicles approached the stopped SUVs, the SUVs resumed traveling along Third Street and ceased blocking traffic. (*Id.*).

The mass picketing and blocking tactics of the Union lasted until approximately 3:00 p.m. on May 25. (*Id.* at 264). Wickham did not take any other photographs or record any

other video either that day or at any other time. (*Id.* at 258-264). That same day, Wickham deleted both the photographs and video he had taken after the picketers ceased blocking access to the jobsite. (*Id.* at 258-259, 263-264). As Wickham testified, he did not think there was any purpose in retaining the photographs once the unlawful activity of the picketers had ended. (*Id.*). Wickham did not show either the photographs or video to any other Brasfield employees or to the Louisville Metro Police Department officers who responded to his complaint, nor did he discuss the photographs or video with any other person. (*Id.*).

### **III. The Law Judge Correctly Applied the Relevant Standard for Determining that Brasfield had a Legitimate Basis for Photographing and Video Recording Workers' Activities.**

As evident in his careful and considered Decision, the Law Judge understood and correctly applied the legal standard of the Board for determining whether an employer had a legitimate justification for taking photographs or video of workers when they are engaged in protected concerted activity, as well as when the activities of workers are unprotected. The Law Judge first considered the standard set forth in *F.W. Woolworth*, 310 N.L.R.B. 1197 (1993), and *National Steel & Shipbuilding Co.*, 324 N.L.R.B. 499 (1997), for determining whether an employer had a reasonable basis to anticipate misconduct. Finding that Wickham had personally observed misconduct, rather than anticipated that misconduct would occur, the Law Judge continued his analysis under *Town & Country Supermarkets*, 340 N.L.R.B. 1410 (2004).

In its first Exception, Charging Party asserts that the Law Judge should have relied on the standard in *National Steel* and that the Law Judge held “that an employer’s subjective, honest belief that unprotected conduct may occur constitutes solid justification for

recordation of protected activity.” No such statement by the Law Judge appears in the Decision.<sup>1</sup> Rather, in finding that Wickham was justified in documenting the misconduct by individuals engaged in the work stoppage, the Law Judge relied upon the fact that Wickham personally witnessed unprotected conduct of individuals involved in the work stoppage. Documentation of actual, present, “real-time” misconduct is not properly analyzed under the *National Steel* standard. Correctly relying on *Town & Country Supermarkets*, 340 N.L.R.B. 1410 (2004), and *Saia Motor Freight Line*, 333 N.L.R.B. 784 (2001), the Law Judge stated as follows:

Finally, I reject the General Counsel and the Union’s arguments that Wickham took the photos and video because he *anticipated* misconduct. The photos and video were taken *while the misconduct was occurring*.

(Decision, p. 10) (emphasis in the original). This conclusion, absent any other findings, serves as a sufficient basis for determining that the General Counsel failed to establish a violation of Section 8(a)(1) of the Act by Brasfield.

Charging Party further incorrectly conflates its argument that the Law Judge failed to apply the appropriate standard with its contention that Brasfield did not meet its burden of proof for the proposition that Wickham had legitimate justification for recording the misconduct he witnessed. The objection of Charging Party to the findings of fact of the Law Judge is insufficient to prove its contention that the Law Judge either misunderstood or misapplied relevant case law. The Law Judge correctly set forth the well-settled standard of the Board for determining the legality of photographing and videotaping activities of employees

---

<sup>1</sup> Charging Party appears to be referencing the Law Judge’s statement that Wickham “believed that the picketers were creating unsafe conditions,” a statement that Charging Party plucks out of context in support of its argument. (Decision, p. 10). The fact is, however, that Wickham’s subjective beliefs about safety were not the basis for the finding of the Law Judge that Wickham had a legitimate justification for photographing the misconduct at the Project.

when actual misconduct is being documented. He then applied that standard to the evidence presented at the hearing and concluded that Brasfield had not committed an unfair labor practice.

As Charging Party both misconstrues the appropriate standard and misinterprets the findings of the Law Judge, its first Exception must be rejected and the Decision should be affirmed.

**IV. The Law Judge Correctly Found that Wickham Photographed and/or Videotaped Acts of Misconduct.**

Wickham testified at length concerning the misconduct of individuals involved in the work stoppage during the hearing, particularly the blocking of ingress and egress at the worksite. The Law Judge found that the misconduct was legitimate justification for Wickham to photograph and record these acts. (Decision, p. 10). In its Second Exception, Charging Party asserts that the amount of evidence of the misconduct presented at the hearing was insufficient, essentially as a matter of law, for the Law Judge to conclude that Wickham documented misconduct as it was occurring. Not surprisingly, Charging Party provides no legal authority in support of this proposition because no such authority exists. The testimony of Wickham concerning the activities that he witnessed on May 24 and 25, 2017, which was substantial, probative and un rebutted, was more than sufficient to support the conclusion of the Law Judge. The argument of Charging Party amounts to nothing more than a specious effort to challenge the findings of fact and legal conclusions of the Law Judge on this issue.

**a. Wickham Observed Misconduct.**

The unfair labor practice charge is predicated on picketers being engaged in protected concerted activity when Wickham photographed and/or recorded them. The activities in which the picketers were engaged when Wickham recorded those acts were not protected.

Blocking ingress to or egress from the Project is illegal, unprotected activity. Moreover, it is established Board law that non-striking employees have a right to pass through picket lines without physical hindrance. Therefore, "blocking an entrance or an exit even for a short period of time constitutes restraint and coercion" within the meaning of Section 8(b)(1)(A) of the Act. *Iron Workers Local 455 (Stokvis Multi-Ton)*, 243 N.L.R.B. 340, 346 (1979); *Metal Polishers Local 67 (Alco-Cad Nickel)*, 200 N.L.R.B. 335, 336 (1972). See also *Clear Pine Mouldings*, 268 N.L.R.B. 1044, 1047 (1984) (Board stated its view that, during a strike, picketers have no right "to block access to the employer's premises."); *Sheet Metal Workers Local 19 (Delcard Associates)*, 316 N.L.R.B. 426, 431 (1995) (union blocking vehicles, during picketing, even for a short period of time, is coercive and violates the Act); *Longshoremen ILA Local 1291 (Trailer Marine)*, 266 N.L.R.B. 1204 (1983) (Board held that the union's blocking ingress/egress at employer's facility constitutes coercive conduct).

Wickham personally observed individuals involved in the picketing activity engage in misconduct. (Hearing Transcript, pp. 284-285). During the morning of May 25, picketers blocked both the Third Street Employee Entrance and the Third Street Delivery Vehicle Entrance. Even after some of the picketers ceased blocking those entrances at the request of Wickham, a group of 30 to 35 picketers continued to block the crosswalk and protected walkway. As Wickham testified, this unprotected activity of picketers prevented workers who were not engaged in the work stoppage from utilizing the Third Street Employee Entrance, forcing those workers to either abandon their efforts to access the Project or find alternate, less safe avenues of entry, including crossing active lanes of traffic. The only photographs taken by Wickham were of the picketers actively engaged in coercive and unlawful

activity – that is, blocking the crosswalk and protected walkway. Wickham did not photograph the main body of picketers stationed on the west side of Third Street.

The same is true with respect to the video taken by Wickham on the afternoon of May 25. Wickham testified that he recorded a short video of three SUVs blocking all active lanes of traffic on Third Street, thereby blocking access to the Third Street Delivery Vehicle Entrance. Again, the individuals driving the SUVs, identified by Wickham as business representatives of Charging Party, were engaged in misconduct when their unlawful activities were recorded by Wickham. Wickham did not record video of the main picket line located on the west side of Third Street, or any other activity engaged in by the picketers.

In any event, Wickham was fully justified in believing that the pickets would continue to block any or all the crosswalks, walkways, gates, and the street. Wickham already had witnessed the picketers blocking ingress and egress at the Third Street Employee Entrance and the Third Street Delivery Entrance. *Kingsbridge Heights Rehabilitation & Care Center*, 352 N.L.R.B. 6, 10 (2008) (In order to validate photographing protected activity, the Board requires an employer to demonstrate that it had a reasonable basis to have anticipated misconduct by employees and thus engaged in photographing or videotaping protected activity to record evidence of misconduct.). By blocking ingress to the jobsite, the picketers prevented other workers on the Project from entering the jobsite and/or forced workers to cross in the middle of a busy street to access the pedestrian entrance. This was the misconduct that Wickham documented.

The testimony of Wickham concerning picketers being present in the crosswalk and protected walkway also is consistent with the testimony of two of the General Counsel's witnesses, David Suetholz and Luis Felipe Estrada Trejo. (Hearing Transcript, pp. 94, 119-122).

Contrary to the position of Charging Party, the picketers plainly engaged in misconduct, Wickham witnessed the unmistakable acts of misconduct, and it is that misconduct which he photographed and video recorded. As the Law Judge accurately noted in the Decision, the Board has expressly sanctioned photographing or videotaping such picket-line misconduct.

**b. The Law Judge was Provided with Sufficient Evidence to Support the Decision.**

By its Exceptions, Charging Party seeks to create a quantum-of-proof standard heretofore non-existent in Board law. Charging Party cites to *Saia Motor Freight Line, Inc.*, 333 N.L.R.B. 784 (2001), and *Town and Country Supermarkets*, 340 N.L.R.B. 1410 (2004), for the proposition that the respondents in those cases provided additional or alternate evidence justifying the photographing or videotaping of workers' activities. (Charging Party's Brief in Support of Exceptions, p. 6). The central flaw in the position of Charging Party is that it reads these decisions as requiring that an employer *must* provide equivalent evidence to support a finding that the misconduct occurred in the first instance. No such evidentiary standard is required by the Board.

Lacking any other avenue to challenge the findings of the Law Judge, Charging Party makes the untenable claim that Brasfield did not provide substantive evidence of misconduct. We believe it states the obvious that Brasfield did provide such evidence in the form of the unrebutted testimony of Wickham. Uncontroverted testimony of a witness constitutes substantial evidence sufficient to meet the required burden of proof. In *NLRB v.*

*Cutting*, 701 F.2d 659, 669 (7th Cir. 1983), the Seventh Circuit, found that the administrative law judge had improperly discredited the consistent testimony of an employer's witness, and stated as follows:

An employer 'need not provide exhaustive proof corroborating the testimony of its witnesses to meet' its burden of proof. 'To require otherwise, in the absence of evidence directly or indirectly contradicting the proof, would be a gross misconception of the standard and an invitation to wholesale discrediting of uncontroverted testimony.'

*Id.* at 669; *see also NLRB v. Consol. Biscuit Co.*, 301 F. App'x 411, 426 (6th Cir. 2008) (unrebutted testimony of a witness constituted substantial evidence). An analogous opinion was expressed by the Supreme Court in *Anderson v. City of Bessemer City*, where the Court stated that it "can virtually never be clear error" for a court to base a finding on credible, coherent, facially plausible, uncontradicted, internally consistent testimony. 470 U.S. 564, 575 (1985). Conspicuously absent from that holding is any requirement that cumulative evidence was necessary to support the findings of the lower court.

The Law Judge correctly determined that this case should be analyzed under the *Town and Country* standard. Contrary to the arguments of the Charging Party, however, neither *Town and Country* nor *Saia Motor* set forth a new evidentiary threshold for determining that the employer had not engaged in unlawful surveillance. In both *Saia Motor* and *Town and Country*, the finding of the Board that no violation had occurred was based on evidence that the photographing or videotaping did not occur until after the employer had witnessed misconduct. *Saia Motor*, 333 N.L.R.B. at 784 (photographing handbillers after they impeded traffic) and *Town and Country*, 340 N.L.R.B. at 1415 (The employer only had pictures taken when the

picketers blocked the entrance to its store.). At the hearing, Brasfield presented equivalent evidence in the form of the testimony of Wickham.

The un rebutted testimony of Wickham was that he observed multiple acts of misconduct of the picketers before he took the first photograph. The Law Judge found that Wickham, rather than anticipating future misconduct, documented two separate instances of misconduct at the Project as they occurred. Wickham witnessed picketers both block ingress and egress to the worksite, and block access to the Project by disrupting traffic near the worksite. (Decision, p. 10.). As such, Wickham was fully justified in documenting the ongoing misconduct of the picketers. Neither the General Counsel nor Charging Party presented evidence which even remotely challenged the accuracy or veracity of that testimony. The Law Judge was warranted, therefore, in relying upon the uncontroverted testimony of Wickham in making his findings.

**c. The Absence of Contradictory Evidence**

While Charging Party incorrectly argues that the testimony of Wickham does not constitute substantive evidence, it fails to justify or explain the absence of evidence or testimony contesting the fact that individuals engaged in misconduct during the work stoppage. As testified to at the hearing, over 100 individuals were involved in the work stoppage on May 25, 2017. Not one of these individuals, including the witnesses for the General Counsel, offered any rebuttal to Wickham's description of the misconduct he witnessed, or claimed that no misconduct occurred at the Project on May 25. The obvious explanation for this lack of rebuttal testimony is that the misconduct occurred just as Wickham witnessed it and testified about it.

Given the complete absence of evidence challenging the testimony of Wickham on the central issues of this case, the only logical and reasonable conclusion which can be reached is that the picketers blocked entrances to the Project and stopped traffic on Third Street near the Third Street Vehicle Delivery Entrance on May 25. The Law Judge, presented with the unrefuted testimony of Wickham, properly relied upon that testimony in finding that misconduct had, in fact, occurred.

**d. Credibility Issues**

The Law Judge found Wickham to be a “very credible witness” who “remembered, in detail, the events that he described.” (Decision, p. 7). In comparison, the Law Judge discredited the testimony of the witnesses presented by the General Counsel, finding, in particular, that the “General Counsel failed to present any credible evidence to establish that on May 24 Wickham pointed his phone at the employees in a manner that indicated he was taking photos or videos of them.” (Decision, p. 8). None of the witnesses for the General Counsel testified that Wickham engaged in surveillance on May 25.

The credibility determinations of the Law Judge should be adopted by the Board. In *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951), the Board established its standard for review the findings of fact of an administrative law judge. *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). The Board noted that because demeanor of witnesses is a factor of consequence in resolving issues of credibility, and the law judge has the advantage of observing witnesses while they testified, it would attach great weight to the credibility findings of the law judge insofar as they are based on demeanor. *Id.* at 545. The Board further clarified, “[h]ence we do not overrule a Trial Examiner’s

resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Id.*

Neither the General Counsel nor Charging Party provided credible testimony or other evidence which in any manner challenged or disputed the events of May 25 as articulated by Wickham. Accordingly, the Board should defer to the well-considered assessment of Wickham's unrebutted testimony by the Law Judge.

**V. Conclusion**

Charging Party's Exceptions to the thorough and well-researched Decision of the Law Judge are baseless and demonstrate a disregard for the record evidence. The Law Judge correctly determined that Brasfield did not violate Section 8(a)(1) of the Act on either May 24 or 25, 2017. The picketers engaged in misconduct and that misconduct was witnessed personally by Wickham. The misconduct of the picketers provided legitimate justification, under the Board's *Town & Country* standard, for Wickham to photograph and video record their unprotected activities. For these reasons, and all the reasons set forth above, Respondent respectfully requests that the Board deny Charging Party's Exceptions to the Decision of the Administrative Law Judge in their entirety.

Respectfully submitted,

SMITH & SMITH ATTORNEYS

/s/ James U. Smith III

James U. Smith III

Jacob W. Crouse

400 North, First Trust Centre

200 South Fifth Street

Louisville, Kentucky 40202

Attorneys for Respondent

Brasfield & Gorrie, LLC

### **STATEMENT OF SERVICE**

I hereby certify that on January 19, 2018, I electronically filed the foregoing with the National Labor Relations Board. In addition, I certify that an electronic copy of the foregoing was sent to:

Garey E. Lindsay  
Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, OH 45202-3271

David Suetholz  
General Counsel  
United Brotherhood of Carpenters and Joiners of America (UBC)  
Indiana/Kentucky/Ohio Regional Council of Carpenters  
515 Park Ave.  
Louisville, Kentucky 40208-2318  
Counsel for Union

Pamela M. Newport and Eric O. Gill  
Kircher Suetholz & Associates PSC  
3142 Losantiville Avenue, Ste. A  
Cincinnati, OH 45213

/s/ James U. Smith III

James U. Smith III